

THE ROLE OF FREEDOM OF EXPRESSION IN THE REALIZATION OF CONSTITUTIONAL STATE

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Abstract

There are various legal, institutional and illegal mechanisms and means for limiting state power. One of these means is constitution. However, any state with a constitution is not a “constitutional state”. The constitution that bears significance for the ‘constitutional state’ is a constitution that limits state power and guarantees fundamental rights and freedoms. On the other hand, freedom of expression enjoys a special importance among the fundamental rights and freedoms. Freedom of expression is important for limited state by virtue of its characteristics that allow both public debate and dissident views and opposition. However, in order for freedom of expression to play a positive part in the realization of constitutional state, a number of factors ranging from the constitution to the understanding of state and from normative regulations to judicial dimension are involved. A constitution that adopts the instrumental state approach, is individual-centered and based on pluralism will guarantee freedom of expression. Moreover, only constitutional guarantees are not enough; application should also take place according to these principles and judicial review should be conducted in accordance with the true function of freedom of expression. The true function of freedom of expression involves protection of questioning and critical remarks.

Keywords: Constitutional state, freedom of expression, supervision of power, neutral state.

1.Introduction

The fundamental quality of a constitutional state or administration is the limitation of state power. The state is an apparatus that uses political power. Political power corresponds to the power

that is capable of taking and implementing binding decisions for the whole society. The legal Formula for political power is sovereignty.

Through sovereignty, the state fulfils its legislative, executive and judicial functions. The fundamental goal of the constitutional state is to prevent the arbitrary use of power in using sovereignty rights (BARBER 2010:5-16). There are various legal, institutional and illegal mechanisms and tools to limit state power. One of these tools is the constitution. However, any state with a constitution is not a “constitutional state”. The constitution that bears significance for the ‘constitutional state’ is a constitution that limits state power and guarantees fundamental rights and freedoms. On the other hand, freedom of expression enjoys a special importance among the fundamental rights and freedoms. Freedom of expression is important for limited state by virtue of its characteristics that allow both public debate and dissident views and opposition.

2. Definition and general characteristics of freedom of expression

Freedom of expression is the freedom of expressing one’s ideas and beliefs freely without any arbitrary interference (VERPEAUX 2010:11). It is also described as “the freedom of expressing ideas” in the relevant literature. In reality, freedom of expression is a freedom that involves various behaviors and processes in itself. These are behaviors and processes such as investigating information and ideas, acquiring them and conveying, explaining or not explaining ideas and beliefs to others.

It is observed that in some international texts concerning human rights, it is so handled as to include all these factors. For example, according to provision 1 in Article 10 of European Convention on Human Rights;

‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.’

According to Article 19 of the United Nations Universal Declaration of Human Rights, ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’.

According to provisions 1 and 2 of Article 19 of International Covenant on Civil and Political Rights; ‘Everyone shall have the right to hold opinions without interference. Everyone

shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Within the framework of these normative regulations, freedom of expression means that an individual can reach information freely without any arbitrary interference, does not feel concerned because of the information and beliefs that they have obtained and their freedom to impart them freely (TANÖR 1969:15).

In the context of such an evaluation, the first dimension of freedom of expression consists of freedoms that are required for the formation of an idea. These are freedoms of investigating, exploring, obtaining and free learning of information and ideas. The second dimension is the freedom of belief provides the guarantee that individuals shall not be worried because of their beliefs and shall not be forced to reveal their ideas and beliefs. Therefore, freedom of belief is also called freedom of “not speaking” or “avoiding speaking”. The third dimension of freedom of expression, on the other hand, involves freedom of imparting and spreading of ideas because even if ideas which individuals can not impart or defend are under guarantee, this can not be taken as a proof of freedom of expression alone (VERPEAUX 2010:32-37).

One of the general characteristics of freedom of expression is that there are many freedoms that serve an important function in its use. For example, freedom of education, freedom of science and art and freedom of press enable ideas and beliefs to form. Likewise, again freedom of press, collective freedoms such as freedom of meeting, demonstration, establishing associations, political parties and trade unions are categories of freedom that help freedom of expression to occur. Especially, practices in some countries concerning expression of ideas are worthy of attention. For example, “picketing”, which means that for the purpose of protesting against a certain process or an application, a group of people stages a demonstration with placards in their hands by following an oval course and moving constantly, is accepted as a means of expression and broadcast by the American Supreme Court (EASTLAND 2000:49-50). On the other hand, individuals’ or groups’ non-violent actions that are called civil disobedience and are intended to be call to the public against an unfair practice are also among means of expression that are beginning to be used widely (FALCÓN Y TELLA 2004:218-220).

On the other hand, freedom of belief, which means freedom to choose what is believed to be right, assumes the name of freedom of thought and faith when it is concerned with the field of religion and morality. Expression of faiths in the field of religion is the use of freedom of worship.

Freedom of press, which is one of the freedoms that serve as a means of using the freedom of expression, appears as a freedom that has an individual and public dimension and helps implement both the freedom of those who use these media (publishers, authors and reporters) to express and disseminate ideas and the public's freedom of obtainment of information (VERPEAUX 2010:113). Freedom of assembly and demonstration is the freedom of individuals to come together in closed spaces or public places within the framework of activities such as meetings, demonstrations and rallies to express an idea or purpose. Freedom of organization is the freedom of individuals to come together in organizations such as associations, trade unions or parties to express their ideas and protect their common interests.

Just as there are many freedoms that serve as means of using freedom of expression, the manner of expression also exhibits variation. Indeed, ideas and beliefs can be expressed through various forms such as speeches, writing, or pictures etc.

Enjoying a special place among freedoms, freedom of expression is worthy of attention especially by virtue of earning individuals respectability. Thinking and generating ideas is an activity that forms the essence of man and makes him man. Descartes explains the relationship between thought and man's existence using the words "I think; therefore I exist". Also, according to Aristotle, the quality of man that distinguishes him from other creatures is his possession of the ability of thought and language, which is the expression of thought.

Freedom of expression bears great significance for the society, besides the individual, by virtue of enabling dissemination of different views and holding free debate. Establishment of a peaceful and stable social life depends on communication among individuals. For a safe and peaceful society, there is a need for ensuring free debate rather than silencing ideas. Indeed, Milton points out the importance of this subject saying "give me the freedoms of learning, saying and discussing before all the other freedoms" (SANDERS 2004:66).

3. Freedom of expression as freedom of opposition

The true function of freedom of expression is that it protects questioning and critical remarks. If it is used only in the sense that it allows expression of ideas that are not questioning but in conformity with the established order or ideas that are considered to be legal, then it can not be regarded as evidence of existence of freedom of expression. Indeed, American Supreme Court's verdict on *Terminiello* dated 1949, it was stated that statements and remarks were generally challenging, provocative and argumentative and that they were strongly opposed to biased judgments in processes where a certain view was intended to be imposed or they could upset the established order (EASTLAND 2000: 88-95).

The fundamental basis of this verdict is that there is a ban on adopting only one truth in constitutional democracies. The fact that ideas are treated equally and no distinctions are made among them such as right or wrong, or legitimate or illegitimate is a guarantee provided by this principle. Indeed, this subject was clarified in a verdict by the same court in 1943 in the following words 'no official authority has the license to determine what is valid in politics, nationalism, religion or a field related to thought' (HUDSON 2008: 257).

The same principle was emphasized in different terms by the European Court of Human Rights. According to the court, 'freedom of expression is valid in terms of not only the expression of information and ideas that are ordinary, harmless or unimportant but also the expression of confusing, worrying and disturbing ideas that run counter to the accepted norms of the state and a certain section of the society'. The court pointed out that the situation in question was a result of pluralism, tolerance and open-mindedness, which are indispensable elements of a democratic society (Prager and Oberschlick /AUSTRIA, Series A. No. 313, 26.4.1995, European Human Rights Review, Vol. 21, 1996: 2; Castells/SPAIN, Series A. No.236, 23.4.1992, European Human Rights Review, Vol. 14,1992: 446; Vogt / GERMANY, Series A. No. 323, 26.9.1995, European Human Rights Review, Vol. 21, 1996: 234). In another verdict, the court made the following comment in more concrete terms, saying that 'ideas that contravene the official view or the status quo will be allowed to be expressed in the politics' (Piermont/FRANCE, Series A.No. 314, 27.4.1995, European Human Rights Review, Vol. 20, 1995: 341). The point that the court made specifically within the framework of these evaluations is that the state and its institutions have to be totally impartial in the face of individual beliefs of philosophical, ideological or religious nature

free discussion of ideas is outside the domain of evaluation of truth (Jerusalem/AUSTRIA, 26958/95, 27.2.2001, par. 42; Feldek/SLOVAKIA, 29032/95, 12.7.2001, par. 85-86).

Through these interpretations, it has been emphasized that freedom of expression is in fact the freedom of dissidence or opposition and therefore no distinction can be made among ideas or abstract or general bans can not be imposed on them. This reflection of the democratic principle that individuals are not obliged to think in accordance with the constitution. Therefore, not only statements that praise and conform to the existing order but also those that can upset it fall within the scope of freedom of expression.

In a court case in Turkey where freedom of expression was evaluated in this sense by judicial bodies, the court pointed out that freedom of expression is not only limited to expressing ideas that are shared by the majority and those who are in power but it also involves expressing ideas that are different from them and run counter to them (Bakırköy 2nd High Criminal Court, Date of Verdict: 20.01.1997, Milliyet, 21.01.1997). Apart from this, in its decision 1991/933, Council of State concluded that the case in question should be considered within the framework of European Convention on Human Rights, and that it is one of the fundamental principles of a democratic society for everybody to express their ideas freely unless they contain concrete provocation or solicitation of crime (Council of State 5th Chamber, Substance: 1986/1723, Verdict: 1991/933, Date of Verdict: 22.5.1991, Journal of Council of State, issue: 84-85, p. 321).

4. Control and limitation of power through public debate

Another function of freedom of expression is to enable public debate. Public debate is a series of forums where Public's ideas, interests and expectations are expressed on an issue that concerns the whole or a part of the society (VERPEAUX 2010:47-48). The word public refers to "people" in general. The adjective public, on the other hand, means being the opposite of individual or private and refers to public and state life.

Issues that concern the society and the state can be related to topics such as how the judicial system will be structured, how a certain freedom will be regulated, how long compulsory education must be, whether troops should be sent abroad or not, whether military service should be obligatory or not, whether euthanasia is a human right or not etc. With a public debate on the aforementioned subjects, a communication environment is established where information, ideas, arguments and counterarguments are expressed and mutually tested.

Firstly, such a communication environment is significant in that it serves the formation of individual autonomy. Individual autonomy concerns everybody making “their own laws”. In this sense, every individual has the right to participate in the making of decisions that will affect their lives. Decisions that affect individuals’ lives do not only consist of choices that they make in their individual or personal lives. Political choices in the judicial system, education, health etc. and the content and nature of law also affect people’s lives in many ways (ERDOĞAN 2009).

Secondly, such a communication environment enables people or the public to become visible. It is necessary for the people/public to become visible in order for constitutional state or government. It is impossible to become a society that influences or controls those in power by acting as mere spectators.

Public debate is generally considered to be a series of forums which reflect traces of people wish to be governed in the context of preferences and expectations that are expressed. In this respect, it is a tool that serves to fulfill the ideal of “a limited and accountable administration” because an administrative mechanism that is sensitive to people will certainly be influenced by this series of forums and determine a certain course of action for themselves.

Holding public debates on issues that concern the public indicates that information is not a monopoly of the administration, which generally helps prevent monopolism on the part of the government. Moreover, holding public debates and negotiations enables fundamental problems and administrative failures to be revealed and heard by the society. Thus, instead of confidentiality and closeness, administrative openness takes place. In this respect, public debate allows a bottom-up administration. Proposing ideas on issues that have been regarded as taboo until then and entering into a process of debate helps narrow the distance between the state and the society. Openness and transparency in government will be possible only to the extent of this narrowing (FUNG/WEIL 2010: 105-108).

Besides openness or transparency, public debate is also an important device in holding administrations accountable. Indeed, an administration that converts problems that become the subject of public debate into political decisions will have to explain why they have made such a regulation or why they have refused different alternatives (FUNG/WEIL 2010: 106-111).

The risk of abuse of power will be reduced to a minimum in an administration which is constantly supervised and is held accountable through public debate.

An issue that has been in all periods of history is that despite its goal of providing trust and security, the state emerges as an organization that tends to abuse the power it possesses. Abuse of power occurs in structures where power is in the hand of a single person or group and is not shared by others. Montesquieu pointed out on the basis of the political conditions of his time that if legislative, executive and judicial powers are concentrated in a single body, this will lead to abuse of power and this in turn may do damage to rights and freedoms. He argued that to prevent this, powers should be in different hands. To this day, various mechanisms have been developed to prevent abuse of power such as constitutionalism, constitutional judiciary, administrative judiciary etc. Naturally, legal supervision consisting of such mechanisms is very important. However, supervision that will take place through public debate in cases when they do not exist, operate slowly or do not operate impartially may be as effective as or more effective than them.

Conducting a rigorous public debate on fundamental policies and political decisions functions as a barrier in the way of decision-makers' tendencies to behave in an elitist manner or independently of the society. It becomes possible to form and express rights and interests on a more concrete level by means of public debate. In democratic regimes, political powers are sensitive to demands and pressure from the public. They may sometimes have to yield to intensifying pressure. Indeed, Mill points out that if an individual is willing or able to defend a right or interest, then it does not run the risk of being neglected. According to the author, people may be safe from others' vices only if they possess the power to survive and protect themselves. Likewise, the author says that 'You can protect your rights and interests from the abuse of the government and those who control them only if you participate in the running of the government. Therefore; 'everyone should be included in the absolute power of the state.' (MILL 1861:43-55, retold by DAHL 2000: 52-53).

It is in this process that public debate emerges as a mechanism that allows being included in the state's absolute power. In constitutional democracies, the fact that legislative, executive and judicial bodies are affected by the process of public debate in terms of their area of activity restricts their power to a significant extent. For example, in a law-making process, not being able to contravene the consensus achieved through public debate is a factor that prevents abuse of legislative power. Likewise, a public debate that focuses on the deeds of administration may significantly reduce occurrence or the possibility of occurrence of corruption in public

administration. Thus, public debate serves as a tool that enables those in power to stay accountable to the public from whom they derive their authority.

5. Requisite conditions

For freedom of expression to have a favorable function in terms of the realization of constitutional state, it is necessary to provide it with a guarantee that is in conformity with its position and function.

One of the determining criteria in this regard is the perception of state in that country. Freedom to remain in the opposition is above all the freedom of thinking differently. To this end, it is necessary to adopt the understanding of neutral state. The understanding of neutral state means not being in favor of or against an ideology or a worldview because conducting a public debate in equal and free conditions is possible only if no privileges are granted to any single idea or no restrictions are imposed on the expression of any idea. Otherwise, some ideas will be considered sacred and therefore will not be questioned whereas there will be attempts to silence some others. However, as Mill stated, you can never be sure that the idea that you wish to silence is wrong. Even if you are sure, silencing it will be the greatest vice to be committed against both the current generation and the future ones (MILL 1988:31).

Mill bases this thesis on three reasons. The first is that the idea that is silenced may be right. Silencing of a debate is indeed a pretension of infallibility. The second is that even if the silenced idea is wrong, it is possible that it contains some truth. The third is that unless objections are raised to the idea that is purported to be true (unless that idea is challenged by opposite ideas), that idea is believed by the majority of its adherents in the form of a prejudice and is not questioned (MILL 1988:31).

Freedom of expression is not under protection in such an environment where an understanding of ideological state prevails because the statement that an idea, opinion or belief will not be granted protection as opposed to another idea, opinion or belief is actually a concrete indication that a distinction or a preference is being made among ideas and opinions. A negative consequence of this that is seen in practice in terms of freedom of expression is a failure on the part of pluralism to take place because formalization of an ideological preference and granting protection to it means there is a desire to shape up all activities of the individual, whether they are cultural or political, according to a certain mould. In an environment like this where pluralism is

rejected, individuals' free thinking abilities will be in danger and emergence of a free public will not be possible (ERDOĞAN 1997:124-126).

Naturally, the possibilities that are mentioned are concerned with the subject of what kind of constitution should be prepared. In order for freedom of expression to serve a restrictive function on power, there must, above all, exist a constitution that is based on human rights. A constitution based on human rights is one that takes human as its fundamental asset and contains norms and principles which restrict the ability of those in power to violate freedoms. In such a constitution where pluralism is stipulated and free development of people is intended, individuals are protected against the state, not the vice versa.

In contrast to this, if sanctity of the state is emphasized instead of freedoms restricting the state, then this is clear evidence that a preference has been made in favor of the authority. In such a preference which comes to mean that individuals exist for the state not vice versa, the state emerges as an "end" not as a "means". It is impossible for freedom of expression to exist in its true sense in a system like this where the state is seen as a sacred entity and regarded as a goal.

Besides the general characteristic of the constitution, normative provisions concerning freedom of expression should also be prepared according to its original function. Proposing divergent ideas is possible in an environment where free flow of ideas is ensured. For this to happen, people should enjoy the right to reach news and information freely. In a regime where people's channels of receiving news are limited, ideas do not serve a function such as guiding the government's policies and correcting them (SPITZ 1969:7).

For the existence of a constitutional state, in addition to the necessity of constitutional principles and norms that protect freedoms, conducting a judicial supervision on whether these principles and norms are followed in practice or not is a very important issue. In this process, it is important to make a functional interpretation of freedom of expression which suggests that it is the freedom of opposition. If this freedom is interpreted by judicial bodies as the freedom of expressing ideas that are in conformity with the established order, not as the freedom of expressing dissident ideas through a pluralistic approach, then it means that it is dealt with as a matter of security. Perceiving freedom of expression as a matter of security rather than as a question of freedom will cause it to be seen as a "threat" and then it will be banned on the pretext that it is harmful and illegitimate. This indicates that priority is given to the protection of the state rather

than of freedom. Thus, freedom of expression will no longer be interpreted as one that limits power and allows expression of different ideas and assume the meaning that only ideas that are believed to be useful and legitimate can be expressed with a view to protecting the state.

6. Conclusion

It is impossible to think any debate that is being conducted within the framework of establishment of a constitutional state independently from the question of freedom of expression. In a system where freedom of expression is not guaranteed, it is evident that constitutional state can not be established fully. Constitutional state is one that is limited in terms of its activities and prevented from using force arbitrarily. Freedom of expression fulfills an important role in this process as it makes freedom of opposition and public debate possible.

The efficiency of freedom of expression in these fields depends on a series of factors ranging from constitution to perception of state and from normative regulations to judicial dimension. It is impossible for a constitution that is prepared with a state-based and authoritarian approach to provide protection for freedom of expression. Freedom of expression can not serve the purpose of limiting state authority in such systems where the perception of end-state dominates. In contrast, an individual-based and pluralistic constitution can provide guarantee for freedom of expression. In such systems, where perception of means-state prevails, freedom of expression can serve the function of limiting power. However, mere constitutional guarantees are not sufficient; practice should also follow these principles and judicial supervision should be conducted in accordance with the true function of freedom of expression. The real function of freedom of expression involves protection of questioning and critical remarks. Its use as a freedom that allows only legitimate ideas that are not questioning but conform to the established order can not be taken as evidence of existence of freedom of expression.

References:

- BARBER, Nicholas William (2010), *The Constitutional State*, Oxford University Press, New York.
- EASTLAND, Tery (2000), (Editor.) *Freedom of Expression in the Supreme Courts, The Defining Cases*, Rowman&Littlefield Publishers, Lanham, Maryland.
- ERDOGAN, Mustafa (1997), *Rejim Sorunu (A Question of Regime)*, Vadi Publications, Ankara.
- ERDOGAN, Mustafa (2009), ‘Cahil Olmayanlara Bir Demokrasi Dersi’ (A Lesson of Democracy for the Non-Illiterate), *Star Daily*, 09. 05. 2009.
- [5] FALCÓN Y TELLA, María José (2004), *Civil Disobedience*, Martinus Nijhoff Publishers, Netherlands.
- FUNG, Archon /WEIL, David (2010), ‘Open Government and Open Society’, in LATHROP, Daniel/RUMA, Laurel (Editors), *Open Government*, O’Reilly Media, Sebastopol CA.
- HUDSON, Jr., David L. (2008), *The Handy Supreme Court Answer Court*, Visible Ink Press, Canton MI.
- MILL, John Stuart (1988), *Hürriyet (Freedom)*, Translated by: Mehmet Osman Dostel, Milli Egitim Publications, Istanbul.
- MILL, John Stuart (1861), *Considerations on Representative Government*, Liberal Arts Press, New York 1958, retold by. DAHL, Robert A. (2000), *On Democracy*, Yale University Press, London.
- SANDERS, Karen (2004), *Ethics&Journalism*, Reprinted, Sage Publications, London.
- SPITZ, David (1969), *Antidemokratik Düşünce Şekilleri*, Translated by: Şiar Yalçın, Milli Egitim Publications, İstanbul.
- TANOR, Bülent (1969), *Siyasi Düşünce Hürriyeti ve 1961 Türk Anayasası (Freedom of Political Opinion)*, Öncü Publications, İstanbul.
- VERPEAUX, Michel (2010), *Freedom of Expression: In Constitutional and International Case Law*, Council of Europe Publishing, Strasbourg.